

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 \_\_\_\_\_/  
4 DANIEL KLEEGER, LISA STEIN and AUDREY HAYS,  
5 Plaintiffs,

6 - v -

7 LESTER EBER; ALEXBAY, LLC f/k/a  
8 LESTER EBER; LLC; CANANDAIGUA NATIONAL  
9 CORPORATION d/b/a CANANDAIGUA NATIONAL  
10 BANK & TRUST; ELLIOT W. GUMAER, JR.;  
11 EBER BROS. & CO., INC.; EBER BROS. WINE AND  
12 LIQUOR CORPORATION; EBER BROS. WINE &  
13 LIQUOR METRO, INC.; EBER-CONNECTICUT, LLC ; and WENDY  
14 EBER,  
15 Defendants.

16 Examination Before Trial of Richard Harris  
17 Hawks Jr., held at 700 Crossroads Building, 2 State  
18 Street, Rochester New York 14614, on August 20, 2018  
19 at a time of 9:00 a.m.

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22  
23  
24  
25 REPORTED BY: ASHLEY FALCONE

PLAINTIFF'S  
EXHIBIT

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10	COLIN RAMSEY, ESQ.,	10	* * *
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<p style="text-align: right;">Page 6</p> <p>1 (It is hereby stipulated and agreed by</p> <p>2 and among counsel that sealing, certification, and</p> <p>3 filing are waived; and that all objections, except as</p> <p>4 to the form of the question, are reserved until the</p> <p>5 time of trial.)</p> <p>6 MR. O'BRIEN: Well, we probably need to</p> <p>7 clarify what that is, I do want the witness to be</p> <p>8 able to read and sign.</p> <p>9</p> <p>10 R I C H A R D H A R R I S H A W K S J</p> <p>11 R., 6483 Cooks Point Road Naples, New York, 14512,</p> <p>12 after having been duly called and sworn, testified as</p> <p>13 follows:</p> <p>14</p> <p>15 EXAMINATION BY MR. BROOK:</p> <p>16 Q. Good morning. Would you please provide your</p> <p>17 home and business address?</p> <p>18 A. My home address is 6483 Cooks Point Road Naples,</p> <p>19 New York, and my work address is 72 South Main</p> <p>20 Street, Canandaigua, New York.</p> <p>21 Q. And you're aware you are being deposed in the</p> <p>22 matter of Kleeberg v. Eber, is that right?</p> <p>23 A. Yes.</p> <p>24 Q. Have you ever been deposed before?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 8</p> <p>1 another one that drives them crazy. So, to the best</p> <p>2 of you're ability if you're answering in the</p> <p>3 affirmative, give yes, or correct, and so on. Do you</p> <p>4 understand that?</p> <p>5 A. Yes.</p> <p>6 Q. Another difference between a typical</p> <p>7 conversation and today, that your answers are under</p> <p>8 oath and you understand what that means, correct?</p> <p>9 A. Yes.</p> <p>10 Q. Now, if I ask a question and you answer it, I'm</p> <p>11 going to assume that you understood my question. So,</p> <p>12 if there's something in my question that you don't</p> <p>13 understand, it's important you let me know, okay?</p> <p>14 A. Yes.</p> <p>15 Q. And another thing that may happen from time to</p> <p>16 time, is there may be objections from Counsel here,</p> <p>17 and unlike what you see on TV, there's no Judge here</p> <p>18 to rule on these sort of things, so unless you're</p> <p>19 instructed not to answer a question, if you're able</p> <p>20 to answer the question, and you understand it, please</p> <p>21 proceed to do so, do you understand that?</p> <p>22 A. I understand that, yes.</p> <p>23 Q. Now, is there any reason such as being under</p> <p>24 unusual stresses, or physical or a mental condition,</p> <p>25 or being under the influence of any substances, that</p>
<p style="text-align: right;">Page 7</p> <p>1 Q. How many times?</p> <p>2 A. About three times.</p> <p>3 Q. When was the last time you were deposed?</p> <p>4 A. Probably 15 years ago.</p> <p>5 Q. Okay. Now, I'm sure you have discussed this</p> <p>6 with your lawyer, but I'm going to go over a few of</p> <p>7 the basics of how this is going to work. In this</p> <p>8 deposition I'm going to be asking you questions, and</p> <p>9 you're going to be answering them under oath, do you</p> <p>10 understand that?</p> <p>11 A. Yes.</p> <p>12 Q. And there are a few differences between a</p> <p>13 deposition and a typical conversation that I want to</p> <p>14 make sure you are aware of, and these are not easy to</p> <p>15 remember, not as easy as it sounds. First, the Court</p> <p>16 Reporter is attempting to transcribe everything you</p> <p>17 say. So, in a normal conversation you might know</p> <p>18 where I'm going with a question before I finish it</p> <p>19 and go ahead and answer, or we might end up talking</p> <p>20 over each other, we need to do our best to try to</p> <p>21 avoid that. Do you understand that?</p> <p>22 A. Yes.</p> <p>23 Q. And another difference is that since this is an</p> <p>24 oral transcription, the Court Reporter cannot</p> <p>25 indicate head nods or other gestures or um-hum is</p>	<p style="text-align: right;">Page 9</p> <p>1 would prevent or limit your ability to testify today</p> <p>2 fully and truthfully?</p> <p>3 A. There is no limitation.</p> <p>4 Q. I'm going to do a few general background</p> <p>5 questions, standard stuff, but I have to go through</p> <p>6 it so -- have you ever been arrested?</p> <p>7 A. No.</p> <p>8 Q. Have you ever been --</p> <p>9 A. You mean a traffic ticket?</p> <p>10 Q. No, arrested meaning put in the clink overnight.</p> <p>11 A. No.</p> <p>12 Q. Okay. Have you ever testified under oath in any</p> <p>13 proceeding besides the three depositions you just</p> <p>14 mentioned?</p> <p>15 A. No.</p> <p>16 Q. Have you been a party to a Court case?</p> <p>17 A. No.</p> <p>18 Q. Are you represented by Counsel here today?</p> <p>19 A. Yes.</p> <p>20 Q. And who's that Counsel?</p> <p>21 A. Dan O'Brien.</p> <p>22 Q. And does Dan O'Brien represent you individually,</p> <p>23 or Canandaigua National Bank?</p> <p>24 A. He represents the organization that I work for.</p> <p>25 Q. And without telling me anything about your</p>

<p style="text-align: right;">Page 42</p> <p>1 BY MR. BROOK:</p> <p>2 Q. But not in his individual capacity. I'm not</p> <p>3 asking you to say what other people may have done, do</p> <p>4 you understand that?</p> <p>5 A. Yes.</p> <p>6 Q. To your knowledge did anyone else from</p> <p>7 Canandaigua National Bank ever review any</p> <p>8 transactions that any Eber Brothers' entity was</p> <p>9 involved in?</p> <p>10 MR. O'BRIEN: In the trust side?</p> <p>11 MR. BROOK: In the trust side, yes.</p> <p>12 MR. O'BRIEN: Okay.</p> <p>13 A. Not in the trust side.</p> <p>14 Q. Now, on the commercial lending side, was there</p> <p>15 involvement by Canandaigua National Bank in reviewing</p> <p>16 transactions that Eber Brothers was engaged with</p> <p>17 there?</p> <p>18 A. I believe there were -- I was not aware of them.</p> <p>19 MR CALIHAN: I'm sorry, read the question</p> <p>20 back again.</p> <p>21 (Read back Page 42, Lines 14 to 17.)</p> <p>22 Q. Now, when I use the term transaction, do you</p> <p>23 understand the term transaction to include a loan?</p> <p>24 A. Yes.</p> <p>25 Q. When did you first meet Lester Eber?</p>	<p style="text-align: right;">Page 44</p> <p>1 Q. So, you knew that Mr. Gumaer was a lawyer at</p> <p>2 Nixon Hargrave, correct?</p> <p>3 A. Yes.</p> <p>4 Q. Do you know when he retired?</p> <p>5 A. No.</p> <p>6 Q. Approximately when was his retirement?</p> <p>7 MR. CALIHAN: Objection to form.</p> <p>8 MR. O'BRIEN: He said he didn't know.</p> <p>9 A. I don't know.</p> <p>10 Q. Do you know if he was retired at the time he</p> <p>11 contacted you -- let me withdraw. Was Mr. Gumaer</p> <p>12 still practicing law at Nixon Hargrave, to the best</p> <p>13 of your knowledge, at the time when you and he first</p> <p>14 discussed the Allen Eber trust?</p> <p>15 A. I believe so.</p> <p>16 Q. Are you aware that at some point Mr. Gumaer</p> <p>17 relocated to Georgia and to Massachusetts for most of</p> <p>18 the year?</p> <p>19 A. Yes.</p> <p>20 Q. Approximately when was that?</p> <p>21 A. That was shortly after we took the relationship</p> <p>22 over, so it had to be 2007 or 2008.</p> <p>23 Q. And what was Mr. Gumaer's role in connection</p> <p>24 with the Allen Eber trust?</p> <p>25 A. He was a co-trustee.</p>
<p style="text-align: right;">Page 43</p> <p>1 A. When did I first meet him?</p> <p>2 Q. Yes.</p> <p>3 A. Shortly after our assuming the relationship,</p> <p>4 which would have been probably early 2007.</p> <p>5 Q. And who in connection with Eber Brothers, or the</p> <p>6 Allen Eber trust, did you communicate with about</p> <p>7 assuming the relationship before you actually did so?</p> <p>8 A. It would have been probably Lester Eber and</p> <p>9 probably Elliot Gumaer.</p> <p>10 Q. Now, Elliot, he also goes by Mike?</p> <p>11 A. Mike, yes.</p> <p>12 Q. How did you refer to him?</p> <p>13 A. Mike, most of the time.</p> <p>14 Q. When did you first meet him?</p> <p>15 A. I was aware of Mr. Gumaer years before that in</p> <p>16 his capacity of working with the law firm Nixon</p> <p>17 Peabody, Nixon Hargrave at the time.</p> <p>18 Q. And have you personally interacted with him?</p> <p>19 A. Not personally, professionally in other trust</p> <p>20 relationships.</p> <p>21 Q. Okay. So, just making sure I understand. So,</p> <p>22 this is not a situation like with Lester where you</p> <p>23 had heard about him just because of his reputation,</p> <p>24 you had actually worked with Mr. Gumaer, correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 45</p> <p>1 Q. Did he have any the role that you were aware of?</p> <p>2 MR. RAMSEY: Form.</p> <p>3 MR. CALIHAN: Objection as to form.</p> <p>4 A. The form or -- excuse me. The other role might</p> <p>5 have been an advisor to the Eber family, to the Eber</p> <p>6 relationship.</p> <p>7 Q. And what do you mean by advisor?</p> <p>8 A. I believe he was handling various legal</p> <p>9 activities and affairs.</p> <p>10 Q. And for which members of the Eber family was he</p> <p>11 handling various legal matters and affairs?</p> <p>12 MR. RAMSEY: Form.</p> <p>13 MR. CALIHAN: Form.</p> <p>14 A. My understanding that it was for the Eber</p> <p>15 Corporation, and in some cases maybe Lester</p> <p>16 personally.</p> <p>17 Q. And was it significant to you in terms of how</p> <p>18 you dealt with the trust's responsibility that Mr.</p> <p>19 Gumaer might be representing Lester Eber personally?</p> <p>20 MR. CALIHAN: Objection to form.</p> <p>21 A. It became a concern because of the conflict.</p> <p>22 Q. What do you mean by the conflict?</p> <p>23 A. Well, in handling being a co-trustees with us,</p> <p>24 and then also handling certain legal activities for</p> <p>25 the Corporation.</p>

<p style="text-align: right;">Page 86</p> <p>1 earlier than that discussion of terminating the</p> <p>2 trust, or was that the first time that you looked</p> <p>3 into that?</p> <p>4 A. We had been considering it for some time, and it</p> <p>5 was soon after the various lawsuits had been filed</p> <p>6 that we felt we were in a position to follow through,</p> <p>7 and continue to look to distribute the assets to the</p> <p>8 trust beneficiaries, would be in the best interest of</p> <p>9 all the beneficiaries here. Short of that, a</p> <p>10 valuation of the Eber assets was a stumbling block.</p> <p>11 Q. Now, to the extent that you can, please walk me</p> <p>12 through your analysis in determining to terminating</p> <p>13 the trust was the best thing for the beneficiaries of</p> <p>14 the trust, in that situation?</p> <p>15 A. Well, in looking at ensuring that all of the</p> <p>16 beneficiaries and the step down here to the second</p> <p>17 and third generations who are receiving the assets,</p> <p>18 our determination was to ensure that assets get to</p> <p>19 the appropriate hands, rather than having much of it</p> <p>20 depleted by one sector -- one side of the family.</p> <p>21 And so, as we took a look at it, because we had</p> <p>22 assets that are non-marketable, we were looking at</p> <p>23 distributing and benefiting the family units</p> <p>24 themselves, the three family units, to the greatest</p> <p>25 extent to avoid any loss of value. And also, to</p>	<p style="text-align: right;">Page 88</p> <p>1 Q. The possibility of a claim --</p> <p>2 A. Okay.</p> <p>3 Q. -- factor into the determination that</p> <p>4 terminating the trust would be the best course for</p> <p>5 the beneficiaries?</p> <p>6 MR. O'BRIEN: If at all.</p> <p>7 MR. BROOK: If at all.</p> <p>8 A. If at all, it factored into the lack of ability</p> <p>9 to be able to provide a fair value for the stock. It</p> <p>10 would allow for the trustee to be able to distribute</p> <p>11 the stock to the beneficiaries, possibly equally, so,</p> <p>12 that they would be able to then reap any kind of</p> <p>13 benefit there, if there was a need to bring any kind</p> <p>14 of action.</p> <p>15 Q. So, is it --</p> <p>16 A. We felt our hands were tied, so to speak,</p> <p>17 because we were not -- we had two co-trustees that</p> <p>18 had an interest in this, and by looking to distribute</p> <p>19 to the beneficiaries, if there was a desire, then the</p> <p>20 beneficiaries could take appropriate action.</p> <p>21 Q. So, is it fair to say, that it factored into the</p> <p>22 decision in that, if an action was to be brought by</p> <p>23 terminating the trust, that action could be brought</p> <p>24 directly by the former beneficiaries, because they</p> <p>25 then owned the shares directly?</p>
<p style="text-align: right;">Page 87</p> <p>1 consider providing for those family members, because</p> <p>2 there had been a decrease and a loss in income coming</p> <p>3 from the other Eber assets.</p> <p>4 Q. Now, to what extent, if at all, did the</p> <p>5 possibility of filing a claim alleging a fraudulent</p> <p>6 transfer factor into your analysis of whether</p> <p>7 terminating the trust was beneficial for the</p> <p>8 beneficiaries?</p> <p>9 MR. O'BRIEN: Form.</p> <p>10 MR. RAMSEY: Form.</p> <p>11 A. To what extent -- can you restate the question,</p> <p>12 please?</p> <p>13 Q. Now, we had been talking a minute ago about the</p> <p>14 possibility of filing a claim on behalf of the trust,</p> <p>15 as the equity holder of the parents of the company</p> <p>16 had authorized the transfer here, whether there could</p> <p>17 be a claim filed there. And you said, rather than do</p> <p>18 that, the decision was made to terminate the trust.</p> <p>19 Is that a fair description?</p> <p>20 A. Yes.</p> <p>21 Q. So, how did that possibility of the filing of</p> <p>22 the claim factor into the determination that</p> <p>23 terminating the trust was beneficial for the</p> <p>24 beneficiaries?</p> <p>25 A. How did the --</p>	<p style="text-align: right;">Page 89</p> <p>1 A. They would be looking at owning the shares</p> <p>2 directly, yes.</p> <p>3 Q. If you would please turn to the fourth page of</p> <p>4 the Exhibit. It says at the top, minutes from</p> <p>5 meeting of Officers for the trust of Allen Eber, do</p> <p>6 you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And this is with the last three page numbers</p> <p>9 857. So, this refers to a meeting on August 18th,</p> <p>10 2011, do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. It says that Elliot Gumaer, Lester Eber, and</p> <p>13 Richard Hawks, trustees of the trust of Allen Eber,</p> <p>14 met at the Canandaigua National Bank in Rochester,</p> <p>15 New York, to discuss and ratify the actions of the</p> <p>16 subsidiaries as described below, and discuss other</p> <p>17 trust business. Is that a fair description of what</p> <p>18 happened during that meeting?</p> <p>19 A. At the meeting there were various forms that</p> <p>20 were presented --</p> <p>21 MR. CALIHAN: There were various what?</p> <p>22 A. Forms presented. The actual documentation and</p> <p>23 so forth was discussed, but I did not see specific</p> <p>24 references to the loans. We discussed the fact that</p> <p>25 there are several things that were going on here and</p>

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90 to 93

<p style="text-align: right;">Page 90</p> <p>1 needed to be done, but had nothing to do with -- the</p> <p>2 trustees had nothing to do with the determination of</p> <p>3 the various obligations.</p> <p>4 Q. Okay. So, just to make sure we are oriented</p> <p>5 here, so this is describing the meeting that occurred</p> <p>6 about ten months before the one we were looking at</p> <p>7 just a minute ago? So this is --</p> <p>8 A. Yes.</p> <p>9 MR. O'BRIEN: You mean the meeting?</p> <p>10 MR. BROOK: The meeting, yes.</p> <p>11 MR. O'BRIEN: The conference call meeting?</p> <p>12 MR. BROOK: Well, the other one was a</p> <p>13 conference call meeting, and this one was an in</p> <p>14 person meeting, except, I think it says here, if you</p> <p>15 look at the next sentence, that Gumaer participated</p> <p>16 by conference call, and it says Wendy Eber was also</p> <p>17 present to facilitate and document the discussion, is</p> <p>18 that correct?</p> <p>19 THE WITNESS: Yes.</p> <p>20 BY MR. BROOK:</p> <p>21 Q. And it says -- the next paragraph reads: The</p> <p>22 trustees ratified three loans made by Lester Eber to</p> <p>23 Eber Brothers Metro, Inc., do you see that?</p> <p>24 A. Yes.</p> <p>25 Q. And is that a fair description of what took</p>	<p style="text-align: right;">Page 92</p> <p>1 on Lester's good will, he gave the money for the</p> <p>2 loan. The loans were ratified by Rick Hawks and Mike</p> <p>3 Gumaer, Lester Eber abstained. A copy of all the</p> <p>4 documents that relate to the loan was provided to</p> <p>5 Richard Hawks. Is that paragraph -- did I read that</p> <p>6 correctly, what's on the page? Just making sure, did</p> <p>7 I read that correctly?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And is, what I just read as described on</p> <p>10 the page, an accurate description of what took place</p> <p>11 during this meeting on August 18th, 2011?</p> <p>12 A. A copy of all the documents related to the loan</p> <p>13 was provided to me, did not occur at that time.</p> <p>14 Q. When, if ever, did that occur?</p> <p>15 A. It occurred after I made the next request which</p> <p>16 was at the meeting we had in January of the following</p> <p>17 year.</p> <p>18 MR. O'BRIEN: June.</p> <p>19 Q. You mean -- was it at the next meeting?</p> <p>20 A. The June 7th, okay.</p> <p>21 Q. Was there a meeting in between the August 2011</p> <p>22 and June 2012 meetings?</p> <p>23 A. No, I was taking the date off here, from the</p> <p>24 top, which came from Wendy, which was January 2nd, of</p> <p>25 '13 and it was actually June 7th of '12, when we had</p>
<p style="text-align: right;">Page 91</p> <p>1 place during that meeting?</p> <p>2 A. The trustees discussed that, it was -- I don't</p> <p>3 believe there was ever a vote taken at this meeting.</p> <p>4 Once again, it comes back to -- if you refer back to</p> <p>5 the --</p> <p>6 MR. O'BRIEN: You answered the question.</p> <p>7 THE WITNESS: Okay.</p> <p>8 Q. So, is it correct that you would not describe</p> <p>9 what occurred in that meeting as a ratification by</p> <p>10 you, of any loans that were made by Lester Eber to</p> <p>11 Eber Brothers Metro?</p> <p>12 MR. RAMSEY: Form.</p> <p>13 A. I would not characterize it as a ratification,</p> <p>14 because for the first time, we are getting the</p> <p>15 information of what is happening here, which led to</p> <p>16 probably the second memo which was the first one here</p> <p>17 --</p> <p>18 Q. Minutes.</p> <p>19 A. -- or minutes, which I had requested information</p> <p>20 which I had not received.</p> <p>21 Q. So, jumping down some to the fourth paragraph,</p> <p>22 it says: After a lengthy discussion about how all the</p> <p>23 income beneficiaries and third parties were offered</p> <p>24 the opportunity to participate in the February 26th,</p> <p>25 2010 loan, but they all declined, and that only based</p>	<p style="text-align: right;">Page 93</p> <p>1 the second meeting, but the first meeting was in</p> <p>2 August of 2011. And that's when I -- this</p> <p>3 information was first provided to us, the second</p> <p>4 meeting was Mike talking about the changes that were</p> <p>5 taking place I'd requested copies of the judicial</p> <p>6 decision summary, and information that had not been</p> <p>7 provided which actually went back to the previous</p> <p>8 meeting, and did not -- had not received.</p> <p>9 Q. And continuing on the issue you raised of</p> <p>10 requesting information, if you look at the last</p> <p>11 paragraph, the third sentence, it says something --</p> <p>12 it appears to be related to the above issues, it says</p> <p>13 quote, Rick requested copies of the operating</p> <p>14 statement for Eber-CT to determine the value of the</p> <p>15 Corporation, they are hereto attached. Is that</p> <p>16 correct, that you requested a statement for Eber</p> <p>17 Connecticut?</p> <p>18 A. I would have requested information from Eber</p> <p>19 Brothers and at that time, if Eber Connecticut was</p> <p>20 the lending from the commercial side, what our</p> <p>21 lending entity was, I was looking to determine</p> <p>22 whether or not the liability of the organization.</p> <p>23 Q. And did you ever actually receive the statement</p> <p>24 that you requested?</p> <p>25 A. Not in the form that I would normally expect it</p>

<p style="text-align: right;">Page 138</p> <p>1 copy of all documents related to the loan was</p> <p>2 provided to you, do you recall being provided with</p> <p>3 those documents at any point?</p> <p>4 A. After the fact, after the second meeting, we did</p> <p>5 get some of those documents, and some of them</p> <p>6 actually came from our own commercial lending area</p> <p>7 who had received them.</p> <p>8 Q. And the second meeting is the June 12th, year</p> <p>9 2012 meeting?</p> <p>10 A. Yes.</p> <p>11 Q. Is there a reason that you didn't follow up, or</p> <p>12 push harder to get those documents sooner than June</p> <p>13 of 2012?</p> <p>14 A. We did not see a reason set forth other than the</p> <p>15 fact we were not aware of a corporate structure</p> <p>16 change until we had been informed of that by Mike</p> <p>17 Gumaer later on.</p> <p>18 Q. Do you recall following up at all to request</p> <p>19 those documents prior to the June 2012 meeting?</p> <p>20 A. I would say verbally we had requested it a</p> <p>21 couple of times directly from Wendy.</p> <p>22 Q. Do you know whether you ever reduced that</p> <p>23 request to writing?</p> <p>24 A. No.</p> <p>25 Q. You didn't or you don't recall?</p>	<p style="text-align: right;">Page 140</p> <p>1 did, okay. Long time ago.</p> <p>2 Q. Understood. The last couple sentences there</p> <p>3 talk about a request by Sally Kleeberg for payment of</p> <p>4 medical expenses. I know you were asked a couple</p> <p>5 questions about this earlier, do you recall Lester</p> <p>6 ever paying -- Lester or the trust ever paying</p> <p>7 Sally's medical expenses?</p> <p>8 A. The trust never paid, I'm not sure about Lester.</p> <p>9 As I told you, there was a period of time when things</p> <p>10 were closing down with Eber Brothers, and certain</p> <p>11 people have been either laid off, or were no longer</p> <p>12 with the organization, and Lester did pick up two to</p> <p>13 three years of medical expenses and medical insurance</p> <p>14 for some of the family members who had actually</p> <p>15 worked for the organization, and then, I believe it</p> <p>16 was in 2011, he discontinued that.</p> <p>17 Q. Okay. So, the money came from Lester</p> <p>18 personally, not from the trust?</p> <p>19 A. Money never came from the trust.</p> <p>20 Q. When is the first time you recall seeing a copy</p> <p>21 of these meeting minutes?</p> <p>22 A. My first recollection would be sometime shortly</p> <p>23 after our June meeting.</p> <p>24 Q. At that point, based on your testimony earlier,</p> <p>25 you indicated that you didn't believe -- you didn't</p>
<p style="text-align: right;">Page 139</p> <p>1 A. We may have. It may have been in an e-mail</p> <p>2 request, I would have to go back to the electronic to</p> <p>3 find out.</p> <p>4 Q. The last paragraph from the meeting minutes from</p> <p>5 August 18th, 2011, makes a reference to Eber CT, and</p> <p>6 your request for the operating statement relating to</p> <p>7 Eber Ct. Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. Do you recall discussing Eber CT at that</p> <p>10 meeting?</p> <p>11 A. The discussion at that time would have been</p> <p>12 trying to find out what had been presented to us, and</p> <p>13 what Eber CT was. We were aware that there was</p> <p>14 lending on the commercial side to Eber, but trying to</p> <p>15 determine exactly where that corporate structure fit</p> <p>16 into our organization it was unclear, and that's why</p> <p>17 we had not specifically requested until then, the</p> <p>18 information on Eber CT.</p> <p>19 Q. So, you at least heard the name Eber CT during</p> <p>20 that meeting? You weren't entirely sure where Eber</p> <p>21 CT fit into --</p> <p>22 A. The Corporation.</p> <p>23 Q. -- the Corporation, but you remember discussions</p> <p>24 about that entity, Eber CT?</p> <p>25 A. As I sit here today remembering it, I believe I</p>	<p style="text-align: right;">Page 141</p> <p>1 agree that there was a ratification of the loans, you</p> <p>2 didn't recall a vote taking place. Given that</p> <p>3 testimony, did you ever make any type of request to</p> <p>4 amend or correct these meeting minutes, to better</p> <p>5 reflect what you recall taking place?</p> <p>6 A. I did not.</p> <p>7 Q. Was there a reason that you didn't?</p> <p>8 A. Probably the only reason would be, in our mind,</p> <p>9 at that point it wouldn't matter because there</p> <p>10 appeared to be conflicting roles that were taking</p> <p>11 place during the minute taker and what we were doing.</p> <p>12 The corporate portion of the meeting is really what</p> <p>13 was being recorded here, and, you know, I think there</p> <p>14 was an attempt to bring in the trustee, the corporate</p> <p>15 trustee, who had previously indicated that they were</p> <p>16 not managing this particular asset from a financial</p> <p>17 standpoint, but to bring us in to make it look like</p> <p>18 we were agreeing to that.</p> <p>19 Q. Given that dynamic, or that dynamic as you just</p> <p>20 described it, would it be all the more reason to make</p> <p>21 sure, on behalf of Canandaigua National Bank, that I</p> <p>22 disagree with certain aspects of these meeting</p> <p>23 minutes?</p> <p>24 MR. BROOK: Objection to form.</p> <p>25 A. I would say in retrospect, yes.</p>

1  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X \*

5 DANIEL KLEEGERG, LISA STEIN and \*

AUDREY HAYS, \*

6 \*

7 PLAINTIFFS, \*

8 vs \*

9 LESTER EBER, ALEXBAY, LLC f/k/a \*

LESTER EBER, LLC, CANANDAIGUA \*

10 NATIONAL CORPORATION d/b/a \*

CANANDAIGUA NATIONAL BANK & TRUST, \*

11 THE ESTATE OF ELLIOT W. GUMAER, \*

JR., EBER BROS & CO, INC, EBER \*

12 BROS, WINE AND LIQUOR CORPORATION, \*

EBER BROS WINE & LIQUOR METRO, \*

13 INC, EBER-CONNECTICUT, LLC and \*

WENDY EBER, \*

14 DEFENDANTS. \*

-----X \*

INDEX NO:

16-CV-9517

LAK

VOL II

15  
16  
17  
18 Deposition of RICHARD HARRIS HAWKS, JR

19 Rochester, New York

20 Thursday, April 11, 2019

21  
22  
23 Reported by:

24 Mary Agnes Drury, RPR, NYACR, CLR

25 JOB NO. 158944



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1 RICHARD HARRIS HAWKS, JR  
2 that prohibited the combination of the trust --  
3 the trust and lending sides?

4 A. I cannot give you specific  
5 situations.

6 Q. Has CNB ever brought an action on  
7 behalf of a trust that it managed against a  
8 co-trustee in court?

9 A. Not to my knowledge.

10 Q. Going back to 2012, and when you  
11 learned about the Eber-Connecticut transfer;  
12 you described how there was a -- I believe, a  
13 phone conversation, and then a brief meeting;  
14 is that right, or was it just one phone  
15 conversation?

16 A. It was a phone conversation, and  
17 then -- we're talking about the same meeting;  
18 it would have been with Mike Gumaer, and  
19 Lester, and Wendy, and then we went into a  
20 short trustees meeting, which -- at which time  
21 we discussed the annual distribution and where  
22 that was going to be funded from.

23 Q. Okay. So was the phone  
24 conversation, was that the first time that you  
25 were made aware that there was anything going

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1 RICHARD HARRIS HAWKS, JR  
2 on with the transfer of the Eber-Connecticut  
3 business?

4 A. It was a quick, brief review of that  
5 information where different sub-corporations  
6 were listed as -- where we were looking to  
7 transfer certain assets over to it.

8 Q. Okay. So at the time of that phone  
9 conversation, were you aware that the proposed  
10 transfer or transfer that had either had  
11 occurred or was about to occur, involved  
12 transferring the Connecticut business to an  
13 entity that was outside the trust?

14 A. At that point, we were not aware  
15 that it was an entity outside of the trust; it  
16 was a transfer of restricted promissory notes.

17 Q. Okay. So are you talking about a  
18 meeting in 2011, when you ratified promissory  
19 notes that had already been issued?

20 A. Yes.

21 Q. Okay. And so I'm talking about  
22 later, after that.

23 At some point you became aware that  
24 the Eber-Connecticut business had been  
25 transferred out of the trusts --

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1 RICHARD HARRIS HAWKS, JR  
2 MR. O'BRIEN: Form.

3 MR. BROOK: -- assets, correct?

4 THE WITNESS: Yes, we did become  
5 aware of that.

6 BY MR. BROOK:

7 Q. Okay. And how did you become aware  
8 of that; was it a phone conversation or email  
9 or --

10 A. Through review of some of the  
11 documents that we had seen, and part of the  
12 meeting notes from a meeting in 2012, I believe  
13 it was.

14 Q. Okay. And by that point, had the  
15 transfer already occurred, or was it something  
16 that was just being contemplated?

17 A. I believe it had already been  
18 transferred.

19 Q. Okay. So --

20 A. I --

21 Q. -- you testified earlier that you  
22 recall CNB being asked to ratify that  
23 transaction, or were you talking about the  
24 loans?

25 A. I'm talking about the loans.

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1 RICHARD HARRIS HAWKS, JR  
2 Q. Was CNB ever asked to ratify the  
3 transfer of Eber-Connecticut to Alexbay?

4 A. Not to my knowledge.

5 Q. Did CNB ever ratify that  
6 transaction?

7 A. I don't believe so.

8 Q. Did you ever discuss the  
9 Eber-Connecticut transfer with Mike Gumaer?

10 A. Yes, when it was recognized that he  
11 had -- excuse me, that this transfer had  
12 occurred, and he had recommended that this --  
13 that the transfer was appropriate to do for the  
14 continuation of the company.

15 Q. Okay. So Mike -- what do you  
16 specifically recall Mike saying? You said he  
17 recommended that it occur?

18 A. He recommended, and through  
19 discussions that he and Lester had had in  
20 helping to manage the company, that this was in  
21 the best interest of the company at that time.

22 Q. So was it your understanding, based  
23 on that conversation that Mike Gumaer had  
24 actually suggested the course of conduct or  
25 that he had just approved it after the fact?

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1 RICHARD HARRIS HAWKS, JR

2 A. I'm not sure if he was the architect  
3 or put it together. I know he was directly  
4 involved with helping run the business for a  
5 number of years, and was winding down, but this  
6 was a suggested transaction to protect the  
7 assets of the corporation.

8 Q. What was your understanding as to  
9 who or what the assets of the corporation were  
10 being protected from?

11 A. The transfers here being protected  
12 to preserve what value there might have been.

13 Q. Preserve it from what? What was the  
14 concern about it, the assets being in the  
15 existing location where they had been?

16 MR. CALIHAN: Form.

17 THE WITNESS: The concern might have  
18 been for the ability to be able to continue  
19 to run what was now the Connecticut  
20 subsidiary, and the need to have  
21 appropriate funding over there.

22 BY MR. BROOK:

23 Q. So I'm still not sure I'm  
24 understanding.

25 So what -- what was it that you were

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1 RICHARD HARRIS HAWKS, JR

2 told about the problems that Eber-Connecticut  
3 was facing with getting funding in its current  
4 corporate structure, prior to being transferred  
5 to Alexbay?

6 A. What was I told --

7 Q. Yes.

8 A. -- about that?

9 It was indicated that there had been  
10 previous funding that had taken place, that it  
11 came directly from one of the shareholders who  
12 was -- happened to be Lester. And that the  
13 transfer here was to allow for capitalization  
14 or providing capital for Eber-Connecticut to be  
15 operating.

16 Q. So was it your understanding that  
17 Lester was providing additional capital to  
18 Eber-Connecticut?

19 A. It was my understanding that the  
20 capital that would have been provided here, he  
21 was not providing additional capital, he was  
22 looking to take some of the assets from the  
23 parent corporation to Connecticut, to relieve  
24 certain lending obligations and so forth, that  
25 he had previously made to the company.

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1 RICHARD HARRIS HAWKS, JR

2 Q. Okay. So in other words, Lester was  
3 looking to convert his debt position with the  
4 company where he loaned money to it, into a  
5 capital or equity position where he was an  
6 owner of the company; is that right?

7 A. It appeared that, yes.

8 Q. And was there any discussion about  
9 whether Lester could do that, given his role as  
10 co-trustee of the trust?

11 A. Through the discussion with Mike,  
12 Lester, and the bank as the co-trustees, we had  
13 reviewed that. But, once again, Mike had  
14 assured that, you know, as far as the  
15 corporation was concerned, this was in the best  
16 interest.

17 We were not assured at that point  
18 and did not find out until later that this was  
19 going to mean that Lester was going to become a  
20 major shareholder or the sole shareholder of  
21 the Connecticut.

22 Q. Did you ever have a one-on-one  
23 discussion with Mike Gumaer where neither  
24 Lester, nor Wendy were part of the conversation  
25 about --

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1 RICHARD HARRIS HAWKS, JR

2 A. From time-to-time, we would have  
3 been, but it was direct phone calls, where  
4 Lester, it may not have been available to  
5 discuss the annual distribution.

6 Q. Did you ever discuss during a  
7 one-on-one discussion with Mike Gumaer the Eber  
8 Connecticut transfer?

9 A. No.

10 Q. Why not?

11 MR. O'BRIEN: If you know.

12 THE WITNESS: Huh?

13 MR. O'BRIEN: If you know.

14 MR. BROOK: You don't have to do  
15 that.

16 MR. O'BRIEN: No. No. You asked  
17 him why not; and that also requires him to  
18 speculate as to what Mike Gumaer may have  
19 been thinking or what Lester may have been  
20 thinking.

21 BY MR. BROOK:

22 Q. I'm asking for your recollection as  
23 to why you didn't try to have a one-on-one  
24 conversation with Mike Gumaer?

25 A. We believed that Mike had been the

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1 RICHARD HARRIS HAWKS, JR  
 2 Brothers stock? How to account for the value  
 3 of the Eber Brothers stock?  
 4 A. How to account for it?  
 5 Q. Yeah.  
 6 A. With Wendy --  
 7 MR. O'BRIEN: It requires a "yes" or  
 8 "no" answer, okay.  
 9 Q. The answer is "yes"?  
 10 A. Yes.  
 11 Q. Who do you recall talking to about  
 12 that?  
 13 A. Both Wendy and Lester.  
 14 Q. In sum and substance, what was the  
 15 conversation that you had with Wendy or Lester  
 16 on that topic?  
 17 A. Basically, the sum of it would be  
 18 where are financial statements that we can use,  
 19 current financial statements to use to do or to  
 20 have a valuation done.  
 21 Q. Okay. So it was less about what the  
 22 value is; it was more following up on this  
 23 request for additional financial information?  
 24 A. Right.  
 25 Q. At some point were you provided with

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1 RICHARD HARRIS HAWKS, JR  
 2 additional financial information?  
 3 A. No.  
 4 MR. RAMSEY: I might have one or two  
 5 follow-ups, but you go, just in the  
 6 interest of time.  
 7 EXAMINATION BY  
 8 MR. CALIHAN:  
 9 Q. Very quickly. I'm not sure I heard  
 10 you completely, but you testified to the effect  
 11 that there was some issue of Mr. Gumaer signing  
 12 the petition for the dissolution of the trust.  
 13 What was your understanding of that  
 14 issue?  
 15 A. My understanding was there was an  
 16 issue of competency at the time.  
 17 Q. When's the last time you had direct  
 18 contact with Mike Gumaer?  
 19 A. Probably in the late 2014 timeframe.  
 20 Q. And did he appear competent to you  
 21 at that time or already starting to suffer from  
 22 some debilitation?  
 23 A. My conversation would have been he  
 24 was a little disoriented. And when I made  
 25 contact, his wife answered the phone and

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1 RICHARD HARRIS HAWKS, JR  
 2 indicated to me that he was not having a good  
 3 day.  
 4 Q. Okay. Had you been told before  
 5 that, that Mike was having health problems?  
 6 A. Somewhat, yes.  
 7 Q. Okay. Were you surprised by your  
 8 exchange with Mrs. Gumaer when she answered the  
 9 phone?  
 10 A. Yes.  
 11 Q. Okay. Did you try to have any  
 12 conversations with Mr. Gumaer after that  
 13 conversation?  
 14 A. We -- the conversation would be by  
 15 either letter or our annual statement would go  
 16 out to him; and I'm assuming that he received  
 17 it. But I also found out later that there was  
 18 a -- someone who was representing him.  
 19 Q. And who was that?  
 20 A. I believe it was Pat Martin, at the  
 21 time.  
 22 Q. Did you raise with anyone, any  
 23 concerns about Mr. Gumaer's competency at any  
 24 time?  
 25 A. No, I did not.

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1 RICHARD HARRIS HAWKS, JR  
 2 Q. Okay. Did you think that it was an  
 3 obligation of yours, if you had concerns about  
 4 the competency of a co-trustee, to raise those  
 5 concerns?  
 6 A. In retrospect, yes, okay. However,  
 7 because of the statute and the ability and  
 8 respect that we have for individuals here, we  
 9 looked to hopefully have this play out.  
 10 Q. Okay. It's a difficult thing to do,  
 11 is it not?  
 12 A. Yes. Yes.  
 13 Q. You had known Mike Gumaer for some  
 14 time?  
 15 A. I had known of him for some time,  
 16 yes.  
 17 Q. And you testified earlier about  
 18 relying on Mike Gumaer in connection with the  
 19 appropriateness of the transfer involving  
 20 Eber-Connecticut.  
 21 Do you recall that?  
 22 A. Yes.  
 23 Q. And I think you had testified  
 24 earlier; although, I may be confusing two  
 25 deposition days, about Mike, in your view,

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1 RICHARD HARRIS HAWKS, JR  
2 wearing two hats sometimes as a lawyer and as a  
3 trustee?

4 A. Yes.

5 Q. And when you were relying on  
6 Mr. Gumaer with respect to the Eber-Connecticut  
7 transaction, did you understand that he was  
8 functioning as a -- as a lawyer or as a  
9 trustee?

10 A. I understood he was --

11 MR. BROOK: Objection to form.

12 THE WITNESS: -- he was functioning  
13 in both capacities.

14 Q. And when you say as a lawyer or you  
15 answered my question as a lawyer; as a lawyer  
16 for whom?

17 A. A lawyer for the Eber Brothers  
18 business.

19 Q. Okay. And did you view then that he  
20 was in a conflict position when he was  
21 providing that advice?

22 A. Yes. Yes. And that would have  
23 referred us then to go back to our conflict of  
24 interest policy.

25 Q. And did you do that?

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1 RICHARD HARRIS HAWKS, JR

2 A. We did, and we reviewed that with  
3 our counsel.

4 Q. And did you get a clean bill of  
5 health in connection with relying on  
6 Mr. Gumaer, as you testified?

7 MR. BROOK: Objection to form.

8 THE WITNESS: It was deemed that his  
9 competence at that point was sufficient.

10 Q. Was sufficient?

11 A. Yes.

12 Q. That his competence was sufficient.  
13 You're talking now about competence  
14 or conflict of interest?

15 A. His confidence -- or the conflict of  
16 interest was not a major issue for us at that  
17 time.

18 Q. All right. Do you recall with  
19 specificity, anything that Mike Gumaer said to  
20 you or in your presence regarding the  
21 Eber-Connecticut transaction?

22 A. No, I do not recall any specific.

23 Q. Okay. Do you recall anything in  
24 writing that you received from him with respect  
25 to the Eber-Connecticut transaction?

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1 RICHARD HARRIS HAWKS, JR

2 A. Nothing in writing from him.

3 Q. Okay. Did you ever inform any of  
4 the beneficiaries about the Harris Beach  
5 fraudulent action -- strike that.

6 Did you ever inform any of the Eber  
7 Trust beneficiaries of the Harris Beach  
8 fraudulent transfer action?

9 A. I did not.

10 Q. Okay.

11 MR. CALIHAN: Those are all the  
12 questions I have. Thank you.

13 MR. BROOK: All right. Well, I do  
14 have a few matters for follow-up, and I  
15 appreciate everyone sticking around for  
16 this.

17 EXAMINATION BY

18 MR. BROOK:

19 Q. So I'm going to show you what was  
20 previously marked as Plaintiffs' Exhibit 47.

21 (Whereupon, Plaintiffs' Exhibit 47,  
22 Gumaer Letter, Dated 1/2/01, Bates Stamped  
23 EB-0001556 to '1557, 2-Pages was previously  
24 marked for identification.)

25 MR. O'BRIEN: Do you have a copy?

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1 RICHARD HARRIS HAWKS, JR

2 MR. BROOK: Unfortunately, I don't.  
3 It is the engagement letter between Mike  
4 Gumaer and Lester Eber.

5 MR. O'BRIEN: You say 47?

6 MR. BROOK: Yes.

7 BY MR. BROOK:

8 Q. If you could, please.

9 That letter is dated January of  
10 2001, which I know is well before you got  
11 involved or Canandaigua National Bank got  
12 involved with the trust.

13 Is that a letter that you recall  
14 ever seeing in terms of Mike Gumaer's tension,  
15 as trustee, lawyer, and director of the Eber  
16 companies.

17 MR. CALIHAN: Objection to form.

18 THE WITNESS: I do not recall seeing  
19 it.

20 Q. Are you aware of how Mike Gumaer was  
21 being compensated for his work as either  
22 trustee, director, or lawyer?

23 A. I was not aware of how he was being  
24 compensated. I did know that neither Lester  
25 nor Mike Gumaer were taking any kind of a